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Attorney for defendant David Reid

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

CR-05-1849 JH

vs.

DAVID REID,

Defendant.

DEFENDANT REID'S REPLY TO GOVERNMENT'S RESPONSE TO  
MOTION TO COMPEL DISCOVERY (DOC. 1598)

Defendant David Reid, by his counsel undersigned, hereby replies to  
the Government's Response to the Motion to Compel Discovery related to  
pen register, cell phone site, or GPS data. The defendant Hill, through his

1 counsel Billy Blackburn, joins in this Reply.

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TIMELINESS

The Government correctly states that the defendant Reid joined in this Motion filed by the defendant Osgood. The Osgood filing was with the acquiescence of the Government as to its timeliness because of the late entry into the case of Osgood and his counsel. Thus, the matter was in the case, presumably for all defendants who chose to join in it. The defendant Reid properly joined in that pleading although after the prior motion deadline for other defendants.

The Court is respectfully urged to allow Reid's joinder in this Motion as the motion was timely filed by Osgood. It makes no logical sense to deny other defendants an opportunity to participate in a motion properly filed by another defendant. The Government is not prejudiced as it was required to respond to the pleading upon Osgood's timely filing in any event. The mere fact that the defendant Osgood entered a guilty plea subsequent to the filing of the motion should not moot the legal issue as to other defendants who joined in the motion.

Further, it was the understanding of defense counsel undersigned that this issue had been raised previously. The court appointed wiretap

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1 expert in this case, Sue Doucette, had requested other counsel to obtain  
2 this information quite some time ago. She, too, was operating under the  
3 understanding that the matter had been filed. It is fair to say that the  
4 pretrial motion history of this case is complicated, convoluted, and difficult  
5 to wrap one's arms around.  
6

7 Various defense counsel had divided up responsibility for certain  
8 areas of work to avoid a duplication of effort. It was the understanding of  
9 counsel undersigned that this matter had been handled by other counsel.  
10 However, in the confusion that has sometimes characterized this case, the  
11 filing of the matter apparently fell through the cracks.  
12

13 When Amy Sirignano entered the case on behalf of defendant  
14 Osgood, she reviewed a number of matters with Ms. Doucette and it was at  
15 that time that they learned that the matter had not been filed. Ms.  
16 Sirignano promptly filed it and counsel for the defendant Reid joined in.  
17

18 The Court is respectfully urged to allow the defendants Reid and Hill  
19 to participate in the litigation of this Motion.  
20

#### 21 INFORMATION REQUESTED

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23 The pleadings filed by the defense and the Government regarding the  
24 Motion to Suppress the Wiretap and the Request for Franks Hearing  
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1 discuss the relevance of much of the information that is sought and how it  
2 can be used to support additional pretrial motions as well as how it will  
3 impact on both the Franks request and the Motion to Suppress. Those  
4 arguments will not be repeated here.  
5

6 With regard to “raw” pen register data, the Government’s position is  
7 that there has been no showing of how it is material for the defense. This  
8 is extensively discussed in the wiretap pleadings filed by this defendant.  
9 In essence, the raw data (as opposed to the sanitized Penlink data) may  
10 contain evidence of PCTDD information or GPS tracking information being  
11 obtained. If that is present, it raises issues as to the propriety of  
12 Government obtaining that information (whether a warrant is required or  
13 not - see discussion *infra*) and impacts necessity in that if the Government  
14 was obtaining other real time information as to location of individuals and  
15 their activities, that is information that should have been related to the  
16 issuing Magistrate in the issue of necessity.  
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20 On this and other issues the Government takes the position that even  
21 if pen register data was collected in violation of the statute, it is not subject  
22 to suppression. The Reply filed by the defendant Reid on the wiretap and  
23 Franks issues squarely addresses this issue. The Government may have  
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1 obtained *content* and/or that the Government failed to notify the issuing  
2 Judge of the content. As stated above, this may require a warrant and,  
3 even if it does not require a warrant, this information impacts the issue of  
4 necessity.  
5

6 As to cell phone site data the Government claims that it is not  
7 discoverable because it will not be used at trial. The Government also  
8 claims that the defense has not suggested how it is material. The fact that  
9 the Government declines to use an item of evidence at trial does not bar its  
10 production. As stated above, the materiality of this information is that the  
11 Government may have obtained information that requires a warrant and  
12 even if it does not, it may impact the issue of necessity.  
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15 Post-cut through dialed digits (PCTDD) are those digits punched or  
16 dialed after a phone call is connected. The data obtained may contain  
17 *content* of conversations. For example, a customer's call to a bank today  
18 may not be answered by an operator, but by a recording asking the  
19 customer to enter personal information such as account number, address,  
20 balance of account, Social Security Administration number, and private  
21 password. This may happen several times daily with calls to the pharmacy,  
22 doctor, a child's school or even the movie theater. The electronic pulses  
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1 after the call is connected are then recorded by a pen register. The  
2 defense believes that content collection requires a Title III wiretap order.

3  
4 The Government is incorrect in its contention that all cell-site data  
5 never requires a warrant. First, there are different types of cell-site data;  
6 historic information, prospective information (which may allow tracking),  
7 and E-911 GPS location information. Courts have utilized a provision of  
8 the Communications Assistance to Law Enforcement Act (CALEA) to  
9 restrict the Government's access to certain cell-site information utilizing a  
10 pen register. "CALEA prohibits the Government from obtaining a  
11 subscribers location solely pursuant to a pen register order." CALEA, 47  
12 U.S.C.A. 1001-1010, 15 ALR, Fed.2d, Series 537. The Government cites  
13 to the Stored Communications Act, but some courts have ruled that the  
14 Statute does not allow the Government access to cell-site information  
15 under either or both the Pen Register Statute and the Stored  
16 Communications Act. See generally, In re U.S. for an Order Authorizing  
17 Installation and Use of a Pen Register, 415 F.Supp.2d 211 (W.D.N.Y.  
18 2006). (requiring probable cause for prospective cell site information), In re  
19 U.S., 441 F.Supp. 2d 816 (S.D.Tex.2006) (limited prospective cell site data  
20 could not be obtained by the government.)  
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1           The Government objects to receiving applications and orders for pen  
2 registers, cell site or GPS data claiming a warrant is not required. See  
3 discussions above. Further, any application for this investigative tool in this  
4 case utilized by the Government contains facts on which that request is  
5 based. If those facts are at variance with other facts on the Wiretap  
6 Affidavit or if they recite sources of information that the issuing Judge was  
7 not made aware of, the defense can use this information in support of its  
8 Motion to Suppress and Request for Franks Hearing (independent of the  
9 requirement of an order issue). Further, if any of those applications  
10 contains statements of an officer, they are a statement of that officer which  
11 the Government has essentially maintained it is disclosing all of. There is  
12 simply no reason for the Government to maintain the secrecy of other  
13 factual statements that may bear on claims made in the application for the  
14 wiretap. Further, the Orders allowing the obtaining of information will show  
15 what categories of data the Government had the ability to obtain. If the  
16 information obtained is at variance with what the issuing Judge was told  
17 about, that supports the request for a Franks hearing and may provide  
18 information in support of the Motion to Suppress.  
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1 RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of July, 2009

2 LAW OFFICES OF  
3 NASH & KIRCHNER, P.C.

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5 BY /S/ Walter Nash  
6 WALTER NASH  
7 Attorney for Defendant Reid  
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was delivered to opposing counsel and all other counsel of record *via* the CM/ECF system this 22<sup>nd</sup> day of July, 2009.

/s/ Walter Nash

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